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upon his part, did not accompany it, but went upon a following train, a different case is presented." *Wood* v. *The Railroad Co.*, supra, to the same effect. These two cases were decided on the ground that since the carrier had no knowledge that the baggage was unaccompanied by the passenger, there was no compensation or consideration when it was carried alone upon which to base the extraordinary liability.

In the event that there has been no concealment of the fact of the passenger taking a different train from that carrying the baggage and the carrier through its agents had knowledge of the fact, the law will imply an obligation on the part of the passenger owning the baggage to pay the freight rate that would be due for carrying it as such, and a lien on the goods as security for its payment, and the carrier will be held liable as a common carrier of merchandise. *The Elvira Harbeck*, 2 Blatchf. 336; *Wilson* v. *Grand Trunk, etc., Ry. Co.*, 57 Me. 138, 2 Am. Rep. 26.

It seems to be held generally that in case the passenger gives the carrier's agent sufficient time, it is the duty of the railroad company to ship the baggage on the same train with the passenger, and it will be liable for the loss or destruction of the baggage, in case it does not do so. *Toledo, etc., R. Co.* v. *Tapp*, supra; *Wald* v. *Pittsburg, etc., R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332; *Coward* v. *East Tenn., etc., Ry. Co.*, 16 Lea 225, 57 Am. Rep. 226. To the effect that the baggage need not necessarily be shipped on the same train but in a reasonable time, see *St. Louis, etc., Ry. Co.* v. *Ray*, 13 Tex. Civ. App. 628.

However, it would seem that regardless of whether the carrier had or did not have knowledge of the fact that the passenger was not going on the same train with his baggage, under the modern methods of handling the transients' belongings, whereby the railroad companies exercise absolute supervision over them, and the passenger does not know where or how his baggage is being transported until he arrives at his destination, the holding in the principal case is undoubtedly the better doctrine. As was stated in an extensive note in 55 L. R. A. 650, to the case of *Marshall* v. *The Railroad*, supra, and which note was cited with approval in *McKibbin* v. *Wisconsin, etc., Ry. Co.*, supra, the passenger cannot be of any protection to the baggage by being present on the same train with it since he does not exercise any control over it, and hence can be of no value or benefit to the carrier by being there. There seems to be no reason under modern conditions for not holding the carrier liable as an insurer whether the passenger is on the same train with his baggage or not. It is certainly just to the passenger and there seems to be nothing unjust to the carrier in so holding. H. S. McC.

IMPLIED RESERVATION OF EASEMENTS.—On the severance of two tenements, what rights pass with the granted premises, in addition to those expressly granted, and what burdens upon the part granted remain in favor of the ungranted portion, in addition to the words of the express grant?

The earlier cases dealing with the subject of implied grants and implied reservations, both in England and in the United States, were liberal in allow-

ing grants and reservations by implication, and quite generally applied the same tests and requirements in the case of each. The presence of necessity gave additional weight to the implication, but the easement could well exist without the necessity. The leading case in support of the doctrine of the implied reservation of easements is *Pyer* v. *Carter,* 1 H. & N. 916, 922. That case held a grant to be given subject to all the apparent signs of servitude which existed, and "by apparent signs must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject."

Many of the earlier American cases show a similar liberality in the allowance of implied grants and reservations. *Lampman* v. *Milks,* 21 N. Y. 505, 507, states this common law rule thus: "If a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." The earlier cases in many of the American states show a similar liberality. *Morrison* v. *King,* 62 Ill. 30; *Dunklee* v. *Wilton Ry. Co.,* 24 N. H. 489; *Kelly,* v. *Dunning,* 43 N. J. Eq. 62, 10 Atl. 276; *Harwood* v. *Benton,* 32 Vt. 724.

The reason for this liberal allowance of reservations is the intended permanence of the arrangements as to the land between grantor and grantee. This is especially true in the older communities, and was more applicable during the early parts of the nineteenth century than it has been since that time. In the present age of large centers of capital and population, where conditions are changing and have lost stable characteristics of the prior period, the earlier doctrine has little room. Permanence is not expected. Whole districts change in a generation, and the appurtenances of a former occupation must give way without reservation, to modern business.

The change has taken place in England, and quite generally in the United States. *Pyer* v. *Carter,* supra, is now overruled. The recent English cases distinguish between the case of an implied grant and that of an implied reservation, and maintain that in the case of a grant, continuous and apparent easements may be implied, together with such easements as are necessary to the reasonable enjoyment of the property conveyed; but with certain exceptions such as easements of necessity and reciprocal easements, a similar reservation cannot be implied in favor of the grantor of land. *Union Lighterage Co.* v. *London Graving Dock Co.,* L. R. [1902], 2 Ch. 557; *Wheeldon* v. *Burrows,* L. R. 12 Ch. Div. 31; *Suffield* v. *Brown,* 4 D. J. & S. 185; *Crossley & Sons* v. *Lightowler,* L. R. 2 Ch. 478.

These English cases define the exception, easement of necessity, to mean an easement without which the property retained cannot be used at all, and not one merely reasonably necessary to the enjoyment of the property. In England, in order to create an easement by way of implied reservation, it is not sufficient that the easement be merely continuous and apparent. The degree of necessity above defined is absolutely requisite.

While the modern English cases are in harmony on the subject, the American states hold a variety of views.

In Pennsylvania the cases uniformly hold that to create an implied reservation, the easement need be merely continuous and apparent. *Manbeck* v. *Jones* 190 Pa. 171; *Geible* v. *Smith,* 146 Pa. 276; *Pierce* v. *Cleland,* 133 Pa. 189; *Cannon* v. *Boyd,* 73 Pa. 179.

Most of the states, however, have departed from the old rule, and now maintain that in order to create an implied easement, there must be some degree of necessity. On the matter of degree, the states differ. New Jersey places grants and reservations in the same class, subject to the same requirements, and holds that in either case, easements will only arise when they are apparent, continuous, and reasonably necessary to the beneficial enjoyment of the property conveyed or reserved. *Toothe* v. *Bryce,* 50 N. J. Eq. 589; *Greer* v. *Van Meter,* 54 N. J. Eq. 270; *Taylor* v. *Wright,* (1909), 76 N. J. Eq. 121, 79 Atl. 433. The New Jersey cases, especially *Greer* v. *Van Meter,* use interchangeably the terms reasonable necessity and reasonable convenience, the test being whether it is reasonable to assume that its continued presence was in the minds of the parties at the time of the sale.

The Wisconsin court, in the case of *Galloway* v. *Bonesteel,* 65 Wis. 79, adhered to the reasonable necessity rule, but distinguished reasonable necessity from mere convenience, defining reasonable necessity to be such as could only be avoided at great expense.

The reasonable necessity rule is quite unsatisfactory. What constitutes the reasonable necessity is always a question of doubt, rendering it uncertain in a given case whether the necessity was reasonable or not. The parties should be able to know, without resort to the interpretation by the courts, just what passes with the grant, and what is reserved. New Jersey has gone on the liberal side of the reasonable necessity rule, and practically agrees with Pennsylvania, that the sole requirements are that the easement shall be continuous and apparent, adding reasonable convenience, which would be present in practically every case. The Wisconsin court, in the case of *Miller* v. *Hoeschler,* 126 Wis. 263, has departed from the reasonable necessity doctrine, and may be said to require a strict necessity. The court in that case says: "Even if in some extreme cases there must be any easement other than right of way implied from necessity, that necessity must be so clear and absolute that without the easement the grantee cannot in any reasonable sense be said to have acquired that which is expressly granted; such indeed as to render it inconceivable that the parties could have dealt in the matter without both intending that the easement be conferred. * * * Such strict limitation we believe to be essential to easy and rapid development at least of our municipalities."

It may be said to be the established rule in the majority of the courts of this country that in order to create an easement by way of implied reservation, the easement must be apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and except when the above requirements are present, he can retain a right over a portion of his land conveyed absolutely, only by express

reservation. *Burns* v. *Gallagher,* 62 Md. 462; *Outerbridge* v. *Phelps,* 58 How. Prac. 77; *Wells* v. *Garbutt,* 132 N. Y. 430; *Covell* v. *Bright,* 157 Mich. 419, 122 N. W. 101; JONES ON EASEMENTS, § 136.

The recent case of *Powers* v. *Heffernan,* 233 Ill. 597, inclines toward the position that there is no distinction between the requisites necessary for the creation of an easement of implied grant and of implied reservation. It allowed the implied reservation, under the facts of the case, although there was no *strict* necessity, thus showing a tendency toward liberal rather than strict construction of the doctrine. It does not express itself on the degree of necessity required, leaving the matter more or less open in Illinois.

The Supreme Court of Michigan, in the recent case of *Brown* v. *Fuller,* (1911), — Mich. —, 130 N. W. 621, adheres to the doctrine of strict necessity, in pursuance of the prior decisions of that court. Two justices, however, dissented. They agreed on the strict necessity rule, but differed as to what constituted a strict necessity. In view of the repeated decisions on the subject, it would seem that the dissenting justices are attempting to set up the reasonable necessity rule under another name.

For a discussion of the subject, with special reference to the case of *Powers* v. *Heffernan,* supra, see 3 ILL. L. REV. 187. H. L. B.

EXTENT OF THE CITY'S RIGHT, UNDER THE POWER OF EMINENT DOMAIN, TO EXEMPTION FROM LIABILITY FOR CONSEQUENTIAL DAMAGES UNDER THE RULE OF DAMNUM ABSQUE INJURIA.—The constitution of New York, Art. 1, Sec. 6, prohibits "the taking of private property for public use without just compensation." As originally interpreted, redress under this clause was limited to cases of *actual taking* of property. So that when no property was taken, no matter how much injury was inflicted, there could be no recovery for it. The leading case under the provision as stated, is *Radcliff's Executors* v. *The Mayor,* (1850), 4 N. Y. 195. The court says, "The plaintiff does not allege that any part of her land *was taken* for the street or avenue; but one portion of the complaint is that she was injured by making the street and avenue on land which bounded two sides of her lot." The injury was held to be *consequential* and not direct and so damnum absque injuria. This term consequential has since been applied to damages so excluded. As consequential damages are allowed in tort and contract actions, but are excluded in actions for injuries caused by acts under the power of eminent domain, they must constitute a separate class, and this meaning must be kept in mind in dealing with this class of cases.

A decision recently handed down by the Supreme Court of New York, Appellate Division, found the plaintiff entitled to substantial damages. In this case, *Ogden et al.* v. *City of New York,* (1910), 126 N. Y. Supp. 189, the plaintiff was owner of property abutting on a street in which excavations were made by the city for the purpose of constructing municipal docks. There was no negligence, but the land caved in on the plaintiff's premises 20 to 30 feet, the street was blocked for two years, and a high board fence was built on the plaintiff's premises to protect the public from the excavation.